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In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMERICAN WAREHOUSE ASSOCIATION AND INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

WILLIAM H. TOWLE
Counsel of Record
Towle, Howie & Puvogel
1010 Lake Street, Suite 210
Oak Park, Illinois 60301
(708) 524-1020

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STATEMENT OF INTEREST

The AMERICAN WAREHOUSE ASSOCIATION (AWA) is the trade association of the public merchandise warehouse industry. It has 382 member warehouse companies located throughout the United States.

The INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES (IARW) is the trade association for the refrigerated warehouse industry. In the United States it has 230 member warehouse companies.

Historically workers in the warehouse industry have been organized by the Teamsters Union. Such Teamsters Union contracts involve multi-employer pension plans. Consequently AWA and IARW member warehouses are subject to the withdrawal liability provisions which are the subject of this proceeding.

The warehouse industry has typically been one of small, family owned businesses. A total of 227 of the 382 member companies of AWA operate but one warehouse. For IARW the number of single plant operators is 146.

Warehouse owners have a great stake in the decision sought to be reviewed. It adversely impacts their ability to sell or transfer their business. This is especially burdensome to the small, family owned business which is usually the major asset of the owner. A lessening of that owner's ability to sell the company has a most serious, adverse consequence.

The warehouse industry has a significant interest in this proceeding.

SUMMARY OF ARGUMENT

In any sale where withdrawal liability is involved the seller always seeks to avoid post-closing withdrawal liability. Thus no sale could escape Section 1392(c) liability under the circuit court's decision. Since this decision is contrary to the view of the PBGC and other circuits, and since it unsettles past sales, it is important and necessary that it be reviewed.

ARGUMENT

THE COURT OF APPEALS DECISION ADVANCES AN INTERPRETATION THAT WILL UNSETTLE PAST SALES AND CONFOUND FUTURE TRANSACTIONS

If one of the purposes of review is to settle uncertainty and establish guides for future conduct this decision should be reviewed. Not only is it contrary to rulings of the administrative agency responsible for the statute, irreconcilable to the decisions in other circuits, but it also creates uncertainty and confusion for the parties subject to the statute.

Applying the decision to a typical sale illustrates the problems created by this decision. In such a transaction both buyer and seller must consider the application of withdrawal liability. The existence of such liability necessarily affects the purchase price, lowering it in all instances. Having reduced the purchase price to reflect this liability the seller wants to assure that it avoids any post-sale imposition of withdrawal liability.

The parties achieve this by doing an asset sale with buyer's assumption of liability pursuant to the statute. Or they can do a stock sale where the company continues to be liable.

Avoidance of post-sale withdrawal liability is always a principal purpose of any sale. When the issue is put in this manner it is clear that the court of appeal's decision would apply Section 1392(c) in every stock sale.

However, Congress did not preclude stock sales. The parties are free under the statute to use either asset sales with statutorily prescribed liability assumption or stock sales where the company continues to be liable.

Since avoiding post-sale liability is always a goal of the seller, the word "avoid" in Section 1392(c) should be read in light of its companion, "evade". There must be some kind of impropriety, or as the Third Circuit understood when it said that the facts involved did not put at issue "...the kind of bad faith that § 1392 guards against...." Dorn's Transp. v. Teamsters Pension Trust Fund, 787 F.2d 897, 902 (3d Cir. 1986).

Section 1392 requires some element of impropriety or lack of good faith. The totality of the transaction must be examined. Whether the stock sale was bona fide in its entirety should be the issue.

There are many reasons why a warehouse sold in a bona fide transaction may subsequently fail. Loss of a large customer, death or incapacity of the new owner, poor management, or even a strike by the union which ultimately causes the company to fail. All of these risks, and many more, are accentuated where small companies are involved.

When a company fails, the trustee may attack the sale under Section 1392(c). Under the Seventh Circuit's decision none of the causes for failure of the company are examined. None of the facts surrounding the sale are examined. The purchase price, terms of sale, condition of the company, experience of the buyer, trend of the business, and all other factors that prove or disprove a bona fide transaction are ignored. The only issue is whether avoidance was a

principal reason for using a stock sale. Such an approach is too narrow, as recognized by other circuits and the PBGC.

Sales which have been consummated in complete good faith are at risk. The ability of future transactions to be done by stock sale is virtually eliminated. Clearly the decision should be reviewed to determine whether that was the intent of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted, and Section 1392(c) recognized to apply only when bad faith is involved.

Respectfully submitted,

William H. Towle
Counsel of Record
Towle, Howie & Puvogel
1010 Lake Street, Suite 210
Oak Park, IL 60301
708-524-1020

Counsel for Amicus Curiae
American Warehouse Association and
International Association of
Refrigerated Warehouses